PP v. BARISAN NASIONAL BAHAGIAN JOHOR BAHRU & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPLICATION NO: WA-44-138-06-2019]
5 AUGUST 2020

CRIMINAL LAW: *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') – Section 56(1) – Forfeiture – Application for – Whether complied with requirements of s. 56(1) of AMLATFPUAA – Whether application satisfied necessary conditions for property to be forfeited – Whether property seized subject matter or evidence relating to commission of money laundering offence – Whether there was any purchaser in good faith for valuable consideration in respect of seized property – Whether application made within period fixed by s. 56(1) of AMLATFPUAA*

CRIMINAL LAW: *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 4(1) – Proceeds of unlawful activity – Application for forfeiture of monies in bank account – Whether monies proceeds of unlawful activity – Whether property seized subject matter or evidence relating to commission of money laundering offence*

This was an application by the Public Prosecutor under s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') to forfeit the sum of RM957,395.65 and all accrued interests held in the first respondent's Maybank Berhad Premier *Mudharabah* Account. The Malaysian Anti-Corruption Commission ('MACC') received information that the former Prime Minister, Dato' Sri Mohd Najib Abdul Razak ('DSNR') had used his position as the Chairman of the Board of Advisors for 1Malaysia Development Berhad ('1MDB') and as the Minister of Finance, Malaysia, for gratification. The gratification involved amounted to RM3.217 billion which was allegedly remitted into his personal bank account at AmPrivate Banking Ambank (M) Berhad. Investigations revealed that the first respondent, Barisan Nasional Bahagian Johor Bahru, received the sum of RM1,500,000 in its Maybank Berhad Premier *Mudharabah* Account *vide* AmIslamic Bank Berhad cheque. The cheque was paid from the first account of DSNR. The Public Prosecutor sought an order to forfeit the sum of RM957,395.65 and all of its accruals in the first respondent's Maybank Berhad Premier *Mudharabah* Account at the Taman Pelangi branch at Johor Bahru. The Public Prosecutor also applied for a notice under s. 61(2) of the AMLATFPUAA to be published in the *Gazette* to call on any third parties claiming to have an interest in the money to appear before this court on the specified date to show cause as to why the money should not be forfeited. The contention of the Deputy Public Prosecutor ('DPP') was that the total sum of RM957,395.65 in the first respondent's Maybank Berhad Premier *Mudharabah* Account was the subject

matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA. The investigations carried out by the MACC revealed that the first respondent had received that money from the cheque drawn from DSNR's first account. According to the DPP, there was also evidence to show that an offence under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') had been committed and that the money received by the first respondent and seized by the applicant originated from unlawful activities related to that offence. The DPP further submitted that the first respondent was not a purchaser in good faith for valuable consideration in respect of the money seized in its account as envisaged by s. 56(2)(b) of the AMLATFPUAA. The issues that arose were (i) whether the application complied with the requirements of s. 56(1) of the AMLATFPUAA; (ii) whether the application had satisfied the necessary conditions for the property to be forfeited; (iii) the offence of money laundering and whether the property seized was the subject matter or evidence relating to the commission of the offence of money laundering; (iv) whether there was any purchaser in good faith for valuable consideration in respect of the seized property; and (v) whether the application was made within the period fixed by s. 56(1) of the AMLATFPUAA .

Held (dismissing prayer (a)):

(1) DSNR was an 'officer of a public body' as defined under s. 3 of the MACC Act. DSNR had a hand in all decisions and actions pertaining to investments and business ventures of 1MDB and these decisions saw the pilfering of monies in a number of transactions which made their way into DSNR's first account. The applicant had established sufficient facts to show that DSNR had personal and monetary interests in the impugned decisions he made for 1MDB. These facts fulfilled the necessary conditions to invoke the presumption under s. 23(2) of the MACC Act for use of office or position for gratification. DSNR had also committed an offence under s. 23(1) of the MACC Act, namely in using his office and position for gratification, that was, the receipt of monies into his first account. The offence of using office or position for gratification under s. 23(1) of the MACC Act falls under the category of 'serious offence' as it is specified in the Second Schedule of the AMLATFPUAA. Being a serious offence, the offence of using office or position for gratification under s. 23(1) of the MACC Act is an 'unlawful activity'. Any property which is wholly or partly derived or obtained from the unlawful activity becomes 'proceeds of an unlawful activity' and the act of engaging in a transaction which involves the proceeds of an unlawful activity is an offence of money laundering under s. 4(1)(a) of the AMLATFPUAA. The monies in both DSNR's first account, either wholly or partly, were proceeds of the offence of using office or

position for gratification under s. 23(1) of the MACC Act as there were ample evidence to show their remittances which were connected with from the decisions and actions taken by DSNR pertaining to the investments and business ventures of 1MDB. DSNR's first account thus consisted of 'proceeds of an unlawful activity' as defined under s. 3 of the AMLATFPUAA. (paras 57, 59, 61-62, 65 & 67)

(2) The cheque issued in favour of the first respondent for the sum of RM1,500,000 which originated from DSNR's first account was received and remitted into the first respondent's Maybank Berhad Premier *Mudharabah* Account. The transaction which involved the proceeds of an unlawful activity had been completed and the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA was said to have been committed. However, the applicant was still under a duty to prove that the money which was seized in the first respondent's Maybank Berhad Premier *Mudharabah* Account was in fact the subject matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA. The first respondent categorically maintained that the sum of RM957,395.65 in its Maybank Berhad Premier *Mudharabah* Account did not originate from the first account of DSNR but came from BN and other contributions made. Unfortunately, there was no specific traverse made by the applicant against this specific challenge. The applicant had not succeeded in proving, on the balance of probabilities, that the sum of RM957,395.65 in the respondent's Maybank Berhad Premier *Mudharabah* Account was the subject matter or evidence relating to the commission of the offence of money laundering. (paras 68-70)

(3) Section 61 of the AMLATFPUAA deals with claims by third parties. The first respondent was not a third party. Other than resisting the application, there was nothing to show that the first respondent made any claim for the money in its Maybank Berhad Premier *Mudharabah* Account which was seized. It was the first respondent's position that the sum of RM957,395.65 in its Maybank Berhad Premier *Mudharabah* Account consisted of contributions and contributions do not fall within the meaning ascribed by s. 56(2)(b) of the AMLATFPUAA. There was no consideration moving from the first respondent to bring it within the meaning of the expression. As such, there was no purchaser in good faith for valuable consideration in respect of that sum of money. (paras 72-73)

(4) The applicant issued a freezing order and later issued a seizure order addressed to 'Maybank Berhad'. The proper bank to which both the freezing and seizure orders ought to be addressed to must be Maybank Islamic Berhad, where the first respondent maintained its Maybank Berhad Premier *Mudharabah* Account, and not Malayan Banking Berhad. An application for forfeiture under s. 56 of the AMLATFPUAA may only be made in respect of any property seized under the Act. A

wrongly addressed seizure order does not make it a correct and valid seizure order. The first respondent's bank in fact was never served with the freezing and seizure order. The consequences of this was obviously disastrous to the application. Thus, there could be no seizure in the absence of a valid seizure order. Where the subject matter of the application was never seized in the first place, there could be no valid application made under s. 56 of the AMLATFPUAA. Hence, on the balance of probabilities, the applicant had not succeeded in proving the requirements under s. 56 of the AMLATFPUAA to have the sum of RM957,395.65 in the first respondent's account forfeited. (paras 74-76 & 78)

Case(s) referred to:
PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC ***(refd)***
PP v. Kuala Dimensi Sdn Bhd & Ors [2019] 3 CLJ 650 CA ***(refd)***
PP lwn. Taiko Fertiliser & Yang Lain [2019] 4 CLJ 480 CA ***(refd)***
Saratogoa Sdn Bhd v. Pentadbir Tanah Johor Bahru [2013] 1 LNS 359 CA ***(refd)***
Siti Aishah Sheikh Abd Kadir v. PP [2014] 1 CLJ 1058 CA ***(refd)***
Zulkefli Hashim v. PP [2009] 1 LNS 94 HC ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 3, 4(1)(a), 56(1)(a), (b), (c), (d), (2)(a)(i), (ii), (iii), (iv), (b), (4), 56A, 59(2), 61(2), (4)(a), (b), (c), (d), (e), 70(1), Second Schedule
Criminal Procedure Code, s. 424
Malaysian Anti-Corruption Commission Act 2009, ss. 3, 23(1), (2), 50(1)
Societies Act 1966, s. 9(c)

For the applicant - Samihah Rhazali, Abdul Rashid Sulaiman; DPP
For the respondent - Syed Faisal Al-Edros Syed Abdullah, Syahrul Syazwan Salehin & Mohd Haziq Dhiyauddin Razali; M/s Syahrul & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

[1] This is an application by the Public Prosecutor under s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUAA") to forfeit the sum of RM957,395.65 and all accrued interest held in the first respondent's Maybank Berhad Premier *Mudharabah* Account No. 551276051779. A freezing order dated 25 June 2018 was issued against the respondent's account and the account was seized on 21 September 2018.

[2] On 19 July 2019, the court allowed for the notice to be published in the *Gazette*. The notice was published in the *Gazette vide* PU(B) 13534/2019. No third party came forward to stake any claim against the seized money.

[3] This application was first heard before another judge. On 27 September 2019, the judge directed the applicant to amend the notice of motion to include the office bearers of the first respondent as the second and third respondents. The amendment was accordingly made.

Brief Background Facts

The Information

[4] The Malaysian Anti-Corruption Commission ("MACC") received information that the former Prime Minister, Dato' Sri Mohd Najib bin Abdul Razak ("DSNR") had used his position as the Chairman of the Board of Advisors for 1Malaysia Development Berhad ("1MDB") and as the Minister of Finance, Malaysia, for gratification. The gratification involved amounted to RM3.217 billion which was allegedly remitted into his personal bank account at AmPrivate Banking AmBank (M) Berhad. The investigating officer for the predicate offence, MACC Superintendent Nur Aida binti Arifin, lodged a report *vide* MACC Report No. 0203/2018.

1Malaysia Development Berhad ("1MDB")

[5] 1MDB was formerly known as Terengganu Investment Authority ("TIA"). It is a sovereign wealth fund owned by the Federal Government through the Minister of Finance (Incorporated) ("MoF Inc") and came directly under the purview of the Minister of Finance. As the Minister of Finance and the Chairman of the Board of Advisors, DSNR had full and absolute powers to make decisions pertaining to all matters relating to 1MDB including investments and business ventures.

Investments And Business Ventures

[6] 1MDB entered into various business ventures as follows:

(i) 1MDB-Petrosaudi Limited ("1MDB-Petrosaudi") in a joint venture with PetroSaudi International Limited of the Saudi Arabia. 1MDB-Petrosaudi in turn entered into a joint venture with Petrosaudi Holding (Cayman) Limited ("Petrosaudi Cayman");

(ii) a joint venture with Aabar Investment PJS ("Aabar"); and

(iii) the acquisition of power producers, Tanjong Energy Holdings Sdn Bhd ("Tanjong Energy") and Mastika Lagenda Sdn Bhd ("Mastika Lagenda").

The investments and business ventures of 1MDB resulted in the following events.

A. The 1MDB-Petrosaudi In A Joint Venture With Petrosaudi International Limited Of The Saudi Arabia

[7] Pursuant to the approval of the Board of 1MDB and the Central Bank of Malaysia, the sum of USD1 billion was slated to be paid into the account of 1MDB-Petrosaudi at JP Morgan (Suisse) SA. However, the following events had transpired:

(i) on 30 September 2009, only the sum of USD300 million was transferred into the account of 1MDB-Petrosaudi at JP Morgan (Suisse) SA. The balance sum of USD700 million was instead transferred into the account of one Good Star Limited ("Good Star") at the RBS Coutts Bank Limited, Switzerland. Good Star is owned by one Low Taek Jho ("Jho Low") and he is also the authorised signatory for Good Star's account at RBS Coutts Bank Limited, Switzerland;

(ii) on 16 May 2011 DSNR and 1MDB approved an additional loan of RM1 billion (equivalent to USD330 million) to 1MDB-Petrosaudi through the subscription of "*Murabaha* Notes" in exchange of a 40% equity for 1MDB in 1MDB-Petrosaudi;

(iii) between 20 May 2011 and 25 October 2011, a total of USD330 million in four transactions was transferred to Good Star's account at RBS Coutts Bank Limited;

(iv) between 18 February 2011 and 10 June 2011, the sums of USD12.5 million and USD12 million were transferred from Good Star's account to the joint account of Prince Faisal bin Turki Al-Saud and Prince Saud bin Abdulaziz Al-Saud at the Riyad Bank, Riyadh, Saudi Arabia ("Riyad Bank Account");

(v) on 24 February 2011 the sum of USD10 million (equivalent to RM30,449,929.97) was transferred from the Riyad Bank Account into the account of DSNR at AmPrivate Banking Account No. 2112022009694 ("first account"); and

(vi) on 14 June 2011 the sum of USD10 million (equivalent to RM30,179,909.46) was transferred from the Riyad Bank Account into the first account.

B. The Joint Venture With Aabar

[8] The joint venture with Aabar was named Abu Dhabi Malaysia Investment Company ("ADMIC"). Pursuant to the joint venture agreement, each party was required to make a capital injection of USD3 billion into ADMIC. For this purpose, 1MDB incorporated 1MDB Global Investment Limited ("1MDB GIL") to issue international bonds for USD3 billion with a letter of support from the Government of Malaysia.

[9] Issuance of the bonds were arranged by Goldman Sachs International ("Goldman Sachs"). 1MDB GIL opened an account at the BSI Bank in Lugano, Switzerland ("BSI Bank") and later, 1MDB issued the international

bonds for USD3 billion. However, after issuance of the bonds Aabar did not make any capital injection into ADMIC. The joint venture too did not kick-off and was not operational.

[10] Pursuant to the issuance of the bonds, 1MDB GIL received the total of USD2,721,000,000 in its account at the BSI Bank. None of this money was used for the approved joint venture purposes. Instead, 1MDB GIL made a number of transactions for investment purposes to Cistenique Investment Fund, Enterprise Emerging Market Fund, Devonshire Capitol Growth Fund, Tanore Finance Corporation ("Tanore"), and Granton Property Holding Limited.

[11] Between 22 March 2013 and 10 April 2013, DSNR received transfers from Tanore for the total sum of RM2,081,476,926 in the first account through nine transactions.

C. The Acquisition Of Two Power Producers, Tanjong Energy Holdings Sdn Bhd. And Mastika Lagenda Sdn Bhd

[12] DSNR approved the acquisition of Tanjong Energy for RM10.6 billion. It was done through 1MDB Energy Limited ("1MEL"), a special purpose vehicle ("SPV"). 1MEL is a wholly-owned subsidiary of 1MDB. After factoring in the debts, Tanjong Energy was eventually acquired at RM8.5 billion. In order to finance the acquisition and its completion, the Board of Directors of 1MDB proposed for a fund-raising exercise and appointed Goldman Sachs as the bookrunner and arranger.

[13] Goldman Sachs proposed for the acquisition to be financed through:

(i) a bridging loan of RM6.17 billion jointly facilitated by Maybank Berhad and RHB Bank Berhad; and

(ii) the issuance of USD bonds for USD1.75 billion through 1MDB Labuan with a coupon rate of 5.99% per annum redeemable in the year 2022.

[14] According to the offering circular for the bonds, the net proceeds after deducting the fees of Goldman Sachs, commission and expenses, shall be partly used to finance the acquisition of Tanjong Energy and partly for general corporate purposes of 1MEL. The USD bonds are jointly guaranteed by 1MDB and International Petroleum Investment Company PJSC ("IPIC") to enable 1MDB to obtain a higher credit rating and take advantage of a more lucrative coupon rate for the bonds. For the purposes of the joint guarantee, an inter-guarantor agreement dated 21 May 2012 was signed whereby the MoF Inc agreed to guarantee the repayment to IPIC of any amounts payable under the bonds.

[15] DSNR approved the acquisition of Mastika Lagenda for RM2.75 billion. It was done through another SPV, 1MDB Energy (Langat) Limited ("1MELL"). 1MELL is a wholly-owned subsidiary of 1MDB. 1MDB entered into an agreement to acquire the power asset of Genting Sanyen Power Sdn Bhd at RM2.75 billion and pursuant to the private placement memorandum, 1MDB will issue guaranteed notes in the sum of USD1.75 billion by private placement with Goldman Sachs. The coupon rate for the guaranteed notes was 5.75% per annum redeemable in the year 2022. The net proceeds from the guaranteed notes after deducting the fees of Goldman Sachs, commission and expenses, shall be partly used to finance the acquisition of Mastika Lagenda and partly for general corporate purposes.

[16] For the acquisition of these two power producers, 1MDB through 1MEL and 1MELL has issued bonds to the tune of USD3.5 billion. From these business ventures, the following transactions had taken place:

(i) on 22 May 2012, the sum of USD576,943,490 was transferred from the account of 1MEL at Falcon Private Bank Limited, Hong Kong ("Falcon Bank") to the account of Aabar Investment PJS Limited ("Aabar BVI") at BSI AG, Lugano, Switzerland ("BSI Bank");

(ii) on 19 October 2012, the sum of USD790,354,855 was transferred from the account of 1MELL at Falcon Bank to Aabar BVI's account at BSI Bank;

(iii) between 25 May 2012 and 14 December 2012 Aabar BVI transferred the total sum of USD637 million from its BSI Bank to the account of Blackstone Asia Real Estate Partners at the Standard Chartered Bank, Singapore under the name of one Tan Kim Loong ("Blackstone Standard Chartered Account");

(iv) on 31 October 2012, DSNR received from Blackstone Standard Chartered Account the sum of USD5 million (equivalent to RM15,149,963.64) in the first account; and

(v) on 20 November 2012, DSNR received from Blackstone Standard Chartered Account the sum of USD25 million (equivalent to RM60,599,963.64) in the first account.

Loans From Deutsche Bank AG

[17] In the year 2014, 1MDB planned to carry out an initial public offering ("IPO") of 1MDB Energy Group in Bursa Malaysia. The object was to redeem the 49% equity of Aabar ("Aabar Options") in each 1MEL and 1MELL during the acquisition phase of the two power producers. The redemption exercise is known as a buy-back option and was made through 1MDB Energy Holdings Limited ("1MEHL"), a subsidiary of 1MDB. For this purpose, DSNR and the Board of Directors of 1MDB agreed to

terminate the Aabar Options and the bridge loan facility made by 1MDB Energy Holdings Limited from Deutsche Bank AG ("Deutsche Bank") amounting to not more than USD300,000,000 so that the IPO could proceed as planned.

[18] On 28 May 2014, 1MEHL made a loan of USD250 million from Deutsche Bank and eventually received USD239,939,970. That money was remitted into the account of 1MDB Energy Holdings Limited at Falcon Bank. On 1 September 2014, 1MEHL made another loan of USD975,000,000 from Deutsche Bank to repay the earlier USD250 million loan and to cover the shortfall in payment for the termination of the Aabar Options. After receiving the money from 1MEHL, Aabar made a number of money transfers to Affinity Equity International Partners Limited and Vista Equity International Partners Limited.

[19] Between June and December 2014, DSNR received the total sum of RM49,930,985.70 in his account at AmPrivate Banking Account No. 2112022011880 ("second account").

The Money Received By DSNR In His Account

[20] According to affidavits filed by the applicant, DSNR received the following monies in his account:

(i) USD10 million (equivalent to RM30,449,929.97) in the first account on 24 February 2011;

(ii) USD10 million (equivalent to RM30,179,909.46) in the first account on 14 June 2011;

(iii) USD5 million (equivalent to RM15,149,963.64) in the first account on 31 October 2012;

(iv) USD25 million (equivalent to RM60,599,963.64) in the first account on 20 November 2012;

(v) the total of RM2,081,476,926 in the first account between 22 March 2013 and 10 April 2013; and

(vi) the total of RM49,930,985.70 in the second account between June and December 2014.

[21] Investigations by MACC Superintendent Woon Yee Nee show that there were 12 transactions involving transfer of funds from the second account to DSNR's current account at AmIslamic Bank Berhad Account No. 2112022011898 ("third account") for the following amounts:

(i) RM25,000,000 on 27 August 2013;

(ii) RM20,000,000 on 23 January 2014;

(iii) RM10,000,000 on 17 March 2014;

(iv) RM10,000,000 on 26 March 2014;

(v) RM2,000,000 on 19 May 2014;

(vi) RM1,000,000 on 23 June 2014;

(vii) RM10,000,000 on 8 July 2014;

(viii) RM1,000,000 on 23 July 2014;

(ix) RM5,000,000 on 23 October 2014;

(x) RM5,000,000 on 13 November 2014;

(xi) RM3,000,000 on 4 December 2014; and

(xii) RM6,000,000 on 11 December 2014.

[22] There were another 12 transactions involving transfer of funds from the second account to DSNR's current account at AmIslamic Bank Berhad Account No. 2112022011906 ("fourth account") for the following amounts:

(i) RM75,000,000 on 27 August 2013;

(ii) RM20,000,000 on 23 January 2014;

(iii) RM10,000,000 on 19 May 2014;

(iv) RM2,000,000 on 23 June 2014;

(v) RM2,000,000 on 23 July 2014;

(vi) RM10,000,000 on 8 July 2014;

(vii) RM15,000,000 on 23 October 2014;

(viii) RM5,000,000 on 24 November 2014;

(ix) RM3,300,000 on 13 January 2015;

(x) RM1,000,000 on 15 January 2015;

(xi) RM10,000,000 on 10 February 2015; and

(xii) RM1,500,000 on 5 February 2015.

The Money Received By The First Respondent In Its Account

[23] Barisan Nasional Malaysia ("BN") was registered on 1 June 1974 as a political party. Its constitution provides that BN shall be administered at the national level by the Supreme Council, at the State level by the State Coordination Committee and for the parliamentary constituencies by the Divisional Coordination Committee. The first respondent is the Divisional Coordination Committee for Johor Bahru. The second respondent is its chairman and the third respondent is the treasurer.

[24] Investigations by the IO reveal that the first respondent received the sum of RM1,500,000 in its Maybank Berhad Premier *Mudharabah* Account No. 551276051779 *vide* AmIslamic Bank Berhad Cheque No. 571921 dated 29 April 2013. The cheque was paid from the first account of DSNR.

Subject Matter Of The Application

[25] The Public Prosecutor seeks for an order to forfeit the sum of RM957,395.65 and all of its accruals in the first respondent's Maybank Berhad Premier *Mudharabah* Account at the Taman Pelangi branch at Johor Bahru, Johor. The Public Prosecutor also applies for a notice under s. 61(2) of the AMLATFPUAA to be published in the *Gazette* to call on any third parties claiming to have an interest in the money to appear before this court on the specified date to show cause as to why the money should not be forfeited.

The Affidavits

[26] The affidavits filed for and against the application are as follows:

(i) "afidavit sokongan" affirmed on 18 June 2019 by Allan Suman Pillai (encl. 2) for and on behalf of the applicant;

(ii) "afidavit" affirmed on 18 June 2019 by Nur Aida binti Arifin (encl. 3) for and on behalf of the applicant;

(iii) "afidavit" affirmed on 18 June 2019 by Woon Yee Nee (encl. 6) for and on behalf of the applicant;

(iv) "afidavit balasan responden" affirmed on 19 August 2019 by Sharil @ Shahrir bin Ab Samad (encl. 11), for and on behalf of the first respondent;

(v) "afidavit balasan responden" affirmed on 19 August 2019 by Sharil @ Shahrir bin Ab Samad (encl. 12), for and on behalf of the first respondent;

(vi) "afidavit balasan responden" affirmed on 19 August 2019 by Sharil @ Shahrir bin Ab Samad (encl. 13) for and on behalf of the first respondent;

(vii) "afidavit balasan pemohon" affirmed on 25 September 2019 by Allan Suman Pillai (encl. 15) for and on behalf of the applicant;

(viii) "afidavit balasan pemohon" affirmed on 25 September 2019 by Nur Aida binti Arifin (encl. 16) for and on behalf of the applicant; and

(ix) "afidavit balasan pemohon" affirmed on 25 September 2019 by Woon Yee Nee (encl. 17) for and on behalf of the applicant.

Brief Deliberations

Contention Of The Applicant

[27] The learned DPP contends that the total sum of RM957,395.65 in the first respondent's Maybank Berhad Premier *Mudharabah* Account No. 551276051779 is the subject matter or evidence relating to commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA. The investigations carried out by the MACC revealed that the first respondent received that money from the cheque drawn from the DSNR's first account. The fact that the money received in the first respondent's account was from DSNR's accounts is not disputed by the first respondent. Neither did the first respondent disputed that it received the money from DSNR.

[28] There is also evidence to show that an offence under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act 2009") has been committed and that the money received by the first respondent and seized by the applicant originated from unlawful activities related to that offence. DSNR too has in fact been charged for that offence. Be that as it may, whether or not DSNR is convicted of that offence is not relevant to the present application because s. 56A of the AMLATFPUAA does not affect the court's powers to issue an order of forfeiture.

[29] As such, the applicant has succeeded, on the balance of probabilities, in proving that an offence under s. 4(1)(a) of the AMLATFPUAA has been committed by DSNR and the money seized from the first respondent's account is part of the proceeds of that unlawful activities.

[30] The learned DPP submits that the first respondent is not a purchaser in good faith for valuable consideration in respect of the money seized in its account as envisaged by s. 56(2)(b) of the AMLATFPUAA. In order for the first respondent to claim the money, it has to satisfy all the conjunctive conditions under paras. (a) to (e) of s. 61(4) of the AMLATFPUAA. It is submitted by the learned DPP that the application of s. 61(4) of the AMLATFPUAA is not only restricted to third parties but applies to all interested parties who wishes to stake a claim on the seized property. In that case, the first respondent too is not excepted from the application of this provision if it intends to claim back the money seized from its Maybank Berhad Premier *Mudharabah* Account.

[31] The first respondent did not dispute the fact that it received the money from DSNR. Although the first respondent claims that it has no knowledge of the source of the money it received, the absence of knowledge in itself is not sufficient to prove on the balance of probabilities that it is a purchaser in good faith for valuable consideration in respect of that money. BN is not a profit-oriented society. Whatever funds, expenses or assistance which are channelled to it on behalf of UMNO, BN or its component parties should

come from the party's funds and not from the personal account of DSNR. This is the main question which the first respondent failed to address when it decided to accept the money.

[32] In her oral submissions, the learned DPP also urges this court to make an order for pecuniary penalty under s. 59 of the AMLATFPUAA.

Contention Of The Respondents

[33] Learned counsel challenges the validity of the amended notice of motion which was filed on 14 October 2019. The amended notice of motion was filed to include the second and third respondents as the office bearers of the first respondent. According to learned counsel, the present application is out of time pursuant to s. 56 of the AMLATFPUAA because it was filed beyond the 12-month period from the date of the freezing order. Although amended, the amendment does not have a retrospective effect as far as the second and third respondents are concerned.

[34] The first respondent is not a legal entity and as such, it cannot sue or be sued. The notice to third parties pursuant to s. 61(2) of the AMLATFPUAA was published in the *Gazette* but this notice was made under the unamended notice of motion. The notice to third parties under the amended notice of motion was never published in the *Gazette*. In essence, there was no publication in the *Gazette* of a third party notice pursuant to s. 61(2) of the AMLATFPUAA for the present application under the amended notice of motion. This made the present application premature.

[35] Learned counsel contends that the offence under s. 23 of the MACC Act 2009 has its own variants. It is the submissions of learned counsel that in the present application, the applicant has failed to identify the exact variant of the predicate offence.

[36] Learned counsel contends that the applicant has failed to show the manner in which the respondents were allegedly complicit in the commission of the predicate offence. As such, the applicant has failed to prove the necessary elements to enable this court to allow its application.

[37] In its affidavits, the applicant has failed to disclose the contents of statements recorded from the witnesses. As such, this court is left with no evidence to consider.

[38] Learned counsel submits that the applicant is under a duty to prove that the sum of RM957,395.65 which was seized in the first respondent's Maybank Berhad Premier *Mudharabah* Account are proceeds of unlawful activities. It is the position of the first respondent that the sum of RM1,500,000 which it received from DSNR on 29 April 2013 has been totally spent to defray the expenses for societal works. This fact was not rebutted by the applicant.

[39] Learned counsel contends that the sum of RM957,395.65 in the first respondent's Maybank Berhad Premier *Mudharabah* Account which is the subject of the present application originated from BN and other contributions made between the months of January and June 2018. It has nothing to do with the RM1,500,000 which originated from DSNR's first account as alleged by the applicant. This is clearly evidenced by the statement of account appended in encl. 12 as exh. "SAS-2".

[40] The respective freezing and the seizure orders were served to the wrong party. The first respondent maintains an account with the Maybank Islamic Berhad as evidenced by the statement of account appended as exh. "WYN-10" in the affidavit of the IO AMLATFPUAA but both the freezing and seizure orders were served on Maybank Berhad. Maybank Islamic Berhad and Maybank Berhad are different entities. One is separate from the other. Since both orders were not served on the correct party, the effect is there was no seizure in the first place. In the absence of any seizure, the present application is seriously flawed and could not stand.

[41] When the applicant amended the notice of motion to include the second and third respondents, the applicant in effect admitted that it had named the wrong party in the application. Be that as it may, the amendment did not rectify the mistake. Pursuant to s. 9(c) of the Societies Act 1966, the first respondent should not have been named as a party in the first place. Suffice if any of its office bearer who is declared and registered as a public officer or just any of its office bearer is named as a party.

[42] Further, the affidavits affirmed by the deponents on behalf of the applicant do not comply with s. 424 of the Criminal Procedure Code. Affidavits for purposes of any criminal proceedings must be affirmed before a Magistrate or the Registrar. As such, there is effectively no affidavit affirmed in support of the application.

Analysis And Findings

[43] Section 56 of the AMLATFPUAA deals with forfeiture of property in cases where there is no prosecution or conviction for a money laundering offence or a terrorism financing offence. Section 56(1) of the AMLATFPUAA provides that an application for the forfeiture of properties seized under the Act to be made before the expiration of 12 months from the date of the seizure. The application is made subject to s. 61 of the AMLATFPUAA. In that regard, the requirement under s. 61(2), namely for a notice to be published in the *Gazette* calling for any third party who claims to have an interest in the property to show cause why the property should not be forfeited, must first be satisfied (see *PP lwn. Taiko Fertiliser & Yang Lain* [2019] 4 CLJ 480 CA; [2019] MLJU 88; [2019] MLRAU 36).

Nature Of Forfeiture Proceedings

[44] The nature of a particular proceedings is not determined solely on the applicable standard of proof. It is elementary that proof on the balance of probabilities is required in civil cases whereas proof beyond reasonable doubt is applicable in criminal proceedings. But there are a number of instances where proof on the balance of probabilities is applicable in criminal proceedings as well, especially in rebuttal of statutory presumptions. Despite the clear provision specifying that the standard of proof applicable in civil proceedings is applicable to proceedings under s. 56 of the AMLATFPUAA, this court takes the view that an application for forfeiture of property such as the present one is in the nature of quasi-criminal proceedings. This is also fortified by the fact that the Public Prosecutor is named as the applicant in the present application instead of the Government of Malaysia.

[45] In *Zulkefli Hashim v. PP* [2009] 1 LNS 94, His Lordship Yaacob Md Sam J (now JCA) referred to the definition in *Black's Law Dictionary* (8th edn) as follows:

> *Black's Law Dictionary* (Eight Edition) mentakrifkan perkataan 'quasi-criminal' proceeding. bermaksud:
>
> > A civil proceeding that is conducted in conformity with the rules of a criminal proceeding because a penalty analogous to a criminal penalty may apply, as in some juvenile proceedings. For example, juvenile delinquency is classified as a civil offense. But like a defendant in a criminal trial, an accused juvenile faces a potential loss of liberty. So criminal procedure rules apply.

[46] The Court of Appeal in *Saratogoa Sdn Bhd v. Pentadbir Tanah Johor Bahru* [2013] 1 LNS 359 CA held *inter alia* as follows:

> [10] We have read the appeal record and submission of the parties in detail. We are grateful to the comprehensive submission of both the learned counsel. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned Federal Counsel, we take the view that the appeal must be allowed. Our reasons, *inter alia*, are as follows:
>
> > (a) **It is trite that provision for forfeiture is quasi criminal in nature** and court will frown at the decision to forfeit if procedural safeguards and compliance are not adhered to in the strict sense. When it relates to landed property, constitutional safeguards must be strictly complied with [see Article 13 of the *Federal Constitution; Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378; [2003] 3 MLJ 1]. (emphasis added)

[47] The seized properties which are liable to forfeiture are properties falling within any of the categories specified in paras. (a) to (d) of s. 56(1) of the AMLATFPUAA. It is thus pertinent to firstly consider whether the application complies with the requirements of s. 56(1) of the AMLATFPUAA.

Whether There Is A Prosecution Or Conviction For An Offence Under Sub-s. 4(1) Or A Terrorism Financing Offence

[48] It is not disputed that there is no prosecution or conviction under s. 4(1) of the AMLATFPUAA or of a terrorism financing offence in respect of the seized properties. In his affidavit (encl. 2) at para. 9, the DPP too confirmed that the Public Prosecutor decided not to proceed with any prosecution under s. 4(1) of the AMLATFPUAA. In this regard, I find that this condition under s. 56(1) of the AMLATFPUAA has been fulfilled.

Publication Of Third Party Notice In The Gazette

[49] Section 61(2) of the AMLATFPUAA makes it mandatory for the notice to be published in the *Gazette* before an application for forfeiture under s. 56(1) may be made. On 19 July 2019 this court allowed for the third party notice to be published in the *Gazette*. The third party notice was accordingly published in the *Gazette vide* PU(B) 13534/2019. This requirement has thus been fulfilled (see *PP lwn. Taiko Fertiliser & Yang Lain* (*supra*)). There are no claims made by any third party.

Burden Of Proof

[50] The standard of proof is one which is required in civil proceedings, namely on the balance of probabilities. Sections 56(4) and 70(1) of the AMLATFPUAA deal with standard of proof. Section 56(4) is applicable in the determination of whether the seized property is the subject matter or evidence of the offence of money laundering whereas s. 70(1) is applicable in the determination of any question of fact in any proceedings under the AMLATFPUAA (see *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305 FC; [2018] 2 MLJ 401; [2018] 1 MLRA 357; [2017] 8 AMR 533).

Whether The Applicant Has Satisfied The Necessary Conditions For The Property To Be Forfeited

[51] In considering this application, it is the duty of this court under sub-s. (2) to be satisfied that the seized property falls under any of the disjunctive categories provided for under sub-paras. (i) to (iv) of s. 56(2)(a) and that there is no purchaser in good faith for valuable consideration in respect of the properties pursuant to s. 56(2)(b) of the AMLATFPUAA. In considering this question, I shall approach the analysis by addressing the following issues, chronologically, namely:

(i) the predicate offence;

(ii) the money laundering offence and whether the seized property is the subject matter or evidence relating to the commission of the offence of money laundering; and

(iii) whether there is any purchaser in good faith for valuable consideration in respect of the seized property.

(a) The Predicate Offence

[52] A necessary component of the offence of money laundering is a predicate offence (see *PP v. Kuala Dimensi Sdn Bhd & Ors* [2019] 3 CLJ 650 CA; [2018] 6 MLJ 37; [2019] 6 MLRA 637; [2018] 5 AMR 789). It is the applicant's case that the constituent predicate offence for the money laundering offence is the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009. Section 23(1) of the MACC Act 2009 provides as follows:

Offence of using office or position for gratification

23. (1) Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

[53] The ingredients of the offence under s. 23(1) of the MACC Act 2009 are as follows:

(i) the accused is officer of a public body; and

(ii) the accused uses his office or position for any gratification, whether for himself, his relative or associate.

[54] In determining whether an offence under s. 23(1) of the MACC Act 2009 has been committed, two rebuttable presumptions are applicable. Firstly, is the presumption of use of office or position for gratification under s. 23(2) and secondly, is the presumption under s. 50(1) of the MACC Act 2009 that the gratification received has been corruptly received. In order for the rebuttable presumptions to apply, the necessary conditions for the application of the rebuttable presumptions must be fulfilled (see *Siti Aishah Sheikh Abd Kadir v. PP* [2014] 1 CLJ 1058 CA; [2013] 6 MLJ 86; [2014] 1 MLRA 496; [2013] 4 AMR 834). Section 23(2) of the MACC Act 2009 reads as follows:

Offence of using office or position for gratification

23. (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

Section 50(1) of the MACC Act 2009 reads as follows:

Presumption in certain offences

50(1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall

A be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

B **[55]** Section 23(1) of the MACC Act 2009 relates to the gratification offence committed by an officer of a public body. Inevitably, the definitions of "officer of a public body" and "gratification" under s. 3 of the MACC Act 2009 must also be considered.

[56] It is thus necessary to determine the existence of the predicate offence C under s. 23(1) of the MACC Act 2009 in order to establish the offence of money laundering and thereafter to determine whether the property seized is the subject matter or evidence relating to the commission of that offence of money laundering. This determination is made on the balance of probabilities.

D **[57]** The fact that at the material time DSNR was an "officer of a public body" as defined under s. 3 of the MACC Act 2009 is not in dispute. He was the Prime Minister and the Minister of Finance. The evidence as presented by the applicant in its affidavits shows that DSNR did receive the "gratification", namely monies in the first account. Chronologically, the E monetary transactions are as follows:

(i) receipt of USD10 million (equivalent to RM30,449,929.97) in the first account on 24 February 2011 (exh. "NAA-9" in encl. 3);

(ii) receipt of USD10 million (equivalent to RM30,179,909.46) in the first F account on 14 June 2011 (exh. "NAA-9" in encl. 3);

(iii) receipt of USD5 million (equivalent to RM15,149,963.64) in the first account on 31 October 2012 (exh. "NAA-14" in encl. 3);

(iv) receipt of USD25 million (equivalent to RM60,599,963.64) in the first account on 20 November 2012 (exh. "NAA-14" in encl. 3); and G

(v) receipt of the total sum of RM2,081,476,926 in the first account between 22 March 2013 and 10 April 2013 (exh. "NAA-17" in encl. 3).

[58] The presumption under s. 50(1) of the MACC Act 2009 necessitates H the receipt of the gratification in order for it to apply. I find there is sufficient evidence disclosed in the affidavits of the applicant to show the receipt of monies in DSNR's first account. Hence, the presumption that the gratification has been corruptly received, applies. Thus, the question which remains to be answered in order to attract the application of the rebuttable I presumption under s. 23(2) of the MACC Act 2009 is whether there is any

evidence in the applicant's affidavits to show that DSNR did make any decision or take any action in relation to the affairs of 1MDB which he has an interest, either directly or indirectly. In order to determine this fact, one needs to consider the affidavit of the IO Predicate.

[59] The IO Predicate in her affidavit (encl. 3) avers that DSNR had a hand in all decisions and actions pertaining to investments and business ventures of 1MDB and that these decisions saw the pilfering of monies in a number of transactions which made their way into DSNR's first account. This was made possible since the memorandum and articles of association of 1MDB (exh. "NAA-2" in encl. 3) provides for the absolute exercise of powers by DSNR as the Prime Minister (then) in the following situations:

(i) article 117 empowers DSNR as the Prime Minister (then) to make any decision relating to the financial management and investment of 1MDB which involves the interest of nation. It had a far-reaching effect as it gave the Prime Minister the final say, especially in financial and investment matters which is the core business of 1MDB as a sovereign wealth fund. On the facts, it can be reasonably inferred that this power has facilitated the transfer of monies into DSNR's first account *vis-a-vis* decisions made and actions taken in respect of the investments and business ventures of 1MDB; and

(ii) the power vested in DSNR as the Prime Minister (then) in respect of the appointment and termination of the directors of 1MDB under art. 68 facilitated the tacit compliance by the directors of all the decisions made and actions taken by DSNR.

[60] The material interest DSNR had in the decisions made and actions taken in the investments and business ventures of 1MDB came to light in the following instances:

(i) the 1MDB-Petrosaudi joint venture entered into on the instructions of DSNR on 26 September 2009 saw the following monetary transactions ultimately took place:

(a) the receipt of USD10 million (equivalent to RM30,449,929.97) in the first account on 24 February 2011 (exh. "NAA-9" in encl. 3); and

(b) the receipt of USD10 million (equivalent to RM30,179,909.46) in the first account on 14 June 2011 (exh. "NAA-9" in encl. 3);

(ii) the acquisition of Tanjong Energy which was approved by DSNR *vide* two resolutions both dated 9 February 2012 and Mastika Lagenda *vide* two resolutions both dated 10 August 2012 had resulted in the following monetary transactions:

A (a) the receipt of USD5 million (equivalent to RM15,149,963.64) in the first account on 31 October 2012 (exh. "NAA-14" in encl. 3); and

(b) the receipt of USD25 million (equivalent to RM60,599,963.64) in the first account on 20 November 2012 (exh. "NAA-14" in encl. 3);

B

(iii) the Abu Dhabi Malaysia Investment Company (ADMIC) joint venture which was approved by the Board of Directors of 1MDB *vide* the directors' circular resolution dated 25 February 2013 and DSNR *vide* a resolution in his capacity as the holder of all special rights redeemable preference shares of 1MDB landed the following monies in DSNR's account:

C

(a) the receipt of the total sum of RM2,081,476,926 in the first account between 22 March 2013 and 10 April 2013 (exh. "NAA-17" in encl. 3);

D (iv) the termination of the Aabar Options and the bridge loan facility made by 1MDB Energy Holdings Limited from Deutsche Bank pursuant to the planned IPO 1MDB Energy Group in Bursa Malaysia which was approved by DSNR and the Board of Directors of 1MDB *vide* the directors' circular resolution dated 22 May 2014 brought about the following monetary transaction:

E

(i) the receipt of the total sum of RM49,930,985.70 in the second account between June 2014 and December 2014 (exh. "NAA-20" in encl. 3).

F **[61]** In considering this documentary evidence I am satisfied, on the balance of probabilities, that the applicant has established sufficient facts to show that DSNR had personal and monetary interests in the impugned decisions he made for 1MDB. These facts fulfil the necessary conditions to invoke the presumption under s. 23(2) of the MACC Act 2009 for use of office or position for gratification.

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[62] Additionally, the IO Predicate also avers in her affidavit that in her investigations and based on contemporaneous documentary evidence, she is satisfied that as the then Prime Minister, the Minister of Finance and Chairman of the Board of Advisors for 1MDB, DSNR has committed an offence under s. 23(1) of the MACC Act 2009, namely in using his office and position for gratification, that is, the receipt of monies into his first account. These averments are premised on sufficient information and relevant documents obtained in the course of her investigation and this court ought to accord it proper weight (see *PP v. Awalluddin Sham Bokhari* (*supra*)). I thus find that the applicant has succeeded, on the balance of probabilities, to prove the predicate offence under s. 23(1) of the MACC Act 2009.

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(b) The Offence Of Money Laundering And Whether The Property Seized Is The Subject Matter Or Evidence Relating To The Commission Of The Offence Of Money Laundering

[63] The offence of money laundering is said to have been committed when a person engages in a transaction that involves the proceeds of an unlawful activity or instrumentalities of an offence. The act may be direct or indirect. The term "proceeds of an unlawful activity" simply means any property within or outside Malaysia which is obtained from any unlawful activity. "Unlawful activity" in turn is defined as any activity which constitutes a serious offence or one which is of such a nature or occurs in such a circumstance that lead to the commission of a serious offence. In the present application, the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 is the "serious offence" which is in contemplation.(see s. 3 of the AMLATFPUAA).

[64] In determining, on the balance of probabilities, whether the applicant has succeeded in proving that the property seized from the first respondent is the subject matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA, an analysis of the relationship between the definitions of "unlawful activity", "proceeds of an unlawful activity" and "serious offence" under s. 3 of the AMLATFPUAA is inevitable.

[65] The offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 falls under the category of "serious offence" as it is specified in the Second Schedule of the AMLATFPUAA. Being a serious offence, the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 is an "unlawful activity". Any property which is wholly or partly derived or obtained from the unlawful activity becomes "proceeds of an unlawful activity" and the act of engaging in a transaction which involves the proceeds of an unlawful activity is an offence of money laundering under s. 4(1)(a) of the Act.

[66] The IO AMLATFPUAA in his affidavit avers that the first respondent has received, in its Maybank Berhad Premier *Mudharabah* Account No. 551276051779, the sum of RM1,500,000 *vide* AmIslamic Bank Berhad Cheque No. 571921 dated 29 April 2013 (exh. "WYN-11" in encl. 6). The fact that the first respondent did receive the sum of RM1,500,000 in its account was not disputed in the respondents' affidavits in-reply.

[67] The monies in both DSNR's first account, either wholly or partly, are proceeds of the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 as there are ample evidence to show their remittances which are connected with from the decisions and actions taken by DSNR pertaining to the investments and business ventures of 1MDB. DSNR's first account thus consists of "proceeds of an unlawful activity" as defined under s. 3 of the AMLATFPUAA.

[68] The cheque issued in favour of the first respondent for the sum of RM1,500,000 which originated from DSNR's first account was received and remitted into the first respondent's Maybank Berhad Premier *Mudharabah* Account No. 551276051779. To that end, the transaction which involves the proceeds of an unlawful activity has been completed and the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA is said to have been committed.

[69] One must not stop there. The applicant is still under a duty to prove that the money which was seized in the first respondent's Maybank Berhad Premier *Mudharabah* Account is in fact the subject matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA. The first respondent categorically maintains that the sum of RM957,395.65 in its Maybank Berhad Premier *Mudharabah* Account did not originate from the first account of DSNR but came from BN and other contributions made between the months of January and June 2018.

[70] A statement of account is appended as exh. "SAS-2" to evidence this fact. Unfortunately, there is no specific traverse made by the applicant against this specific challenge. In this regard, I find that the applicant has not succeeded in proving, on the balance of probabilities, that the sum of RM957,395.65 in the respondent's Maybank Berhad Premier *Mudharabah* Account is the subject matter or evidence relating to the commission of the offence of money laundering.

(c) Whether There Is Any Purchaser In Good Faith For Valuable Consideration In Respect Of The Seized Property

[71] At the onset, it is pertinent for the purposes of clarity to pause here and reflect that in the present application, there is no claim made by any third parties. Before this court is the applicant's application to forfeit the sum of RM957,395.65 which was seized in the first respondent's Maybank Berhad Premier *Mudharabah* Account and the respondents are merely resisting that application. It follows that it is for this court to be satisfied that the first respondent does not fall within the class of person envisaged by para. (b) of s. 56(2) of the AMLATFPUAA and not for the first respondent to prove that it is entitled to it pursuant to the conjunctive conditions under paras. (a) to (e) of s. 61(4) as a third party claimant. A distinction has to be drawn between a respondent who is resisting an application under s. 56 and a third party making a claim under s. 61. The present case is obviously the former.

[72] Section 61 of the AMLATFPUAA deals with claims by *bona fide* third parties. The first respondent is not a third party. Other than resisting the application, there is nothing to show that the first respondent made any claim for the money in its Maybank Berhad Premier *Mudharabah* Account which was seized. That is plain and obvious. Thus, the question which must be determined is whether the applicant has succeeded in proving, on the balance

of probabilities, that the first respondent is not a *bona fide* purchaser for valuable consideration insofar as the sum of RM957,395.65 in its Maybank Berhad Premier *Mudharabah* Account is concerned.

[73] Having moved the consideration of s. 61 of the AMLATFPUAA out of the way, this court shall now consider whether or not the respondent is a *bona fide* purchaser for valuable consideration. The question of whether a person acted *bona fide* is dependent on the facts and circumstances of each case. It is the first respondent' position that the sum of RM957,395.65 in its Maybank Berhad Premier *Mudharabah* Account consists of contributions. To my mind, contributions do not fall within the meaning ascribed by s. 56(2)(b) of the AMLATFPUAA. There was no consideration moving from the first respondent to bring it within the meaning of the expression. As such, I find that there is no purchaser in good faith for valuable consideration in respect of that sum of money.

Whether The Application Is Made Within The Period Fixed By s. 56(1) Of The AMLATFPUAA

[74] The issue of whether there was a valid freezing and seizure order has not escaped the attention of this court. In the present application, the applicant issued a freezing order (exh. "WYN-4") dated 25 June 2018 and later issued a seizure order (exh. "WYN-5") on 21 September 2018. Both orders were addressed to "Maybank Berhad". It is the applicant's own case that the first respondent maintains a Maybank Berhad Premier *Mudharabah* Account, not just any account.

[75] In this regard, I am constrained to agree with the submissions of learned counsel that the proper bank to which both the freezing and seizure orders ought to be addressed to must be Maybank Islamic Berhad and not Malayan Banking Berhad. Maybank Islamic Berhad is licensed as an Islamic bank whereas Malayan Banking Berhad is licensed as a commercial bank. Each of them is a distinct entity and separately licensed as a financial institution.

[76] An application for forfeiture under s. 56 of the AMLATFPUAA may only be made in respect of any property seized under the Act. A wrongly addressed seizure order does not make it right a correct and valid seizure order. The first respondent's bank in fact was never served with the freezing and seizure order. The consequences of this is obviously disastrous to the application. In this respect, I find that there can be no seizure in the absence of a valid seizure order. Where the subject matter of the application was never seized in the first place, there can be no valid application made under s. 56 of the AMLATFPUAA.

Whether A Pecuniary Penalty Order Should Be Made Against The Respondent

[77] The learned DPP applied orally for this court to make an order under s. 59(2) of the AMLATFPUAA to impose a pecuniary penalty against the respondent. I find that this was never part of the prayer included in the applicant's application. There was also nothing in the applicant's affidavit to support that application and this has resulted in the respondents being denied any avenue to respond. In any event, an order for pecuniary penalty under s. 59(2) of the AMLATFPUAA necessitates an order of forfeiture to be made first. In the absence of an order for forfeiture, an order for pecuniary penalty could not be validly made. I find that the learned DPP has not shown sufficient basis for this court to make such an order.

Conclusion

[78] After analysing the affidavits of the parties together with the relevant exhibits and considering the submissions of the learned DPP and learned counsel, I find that, on the balance of probabilities, the applicant has not succeeded in proving the requirements under s. 56 of the AMLATFPUAA to have the sum of RM957,395.65 in the first respondent's account forfeited. In the circumstances, I hereby dismiss prayer (a).